NO. 21678

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVORY COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On June 16, 1965, a four-count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division.

The indictment charged two counts of concealment and two counts of sale of illegally imported narcotics.

Appellant was convicted of all counts [C. T. 32]. 1/

Appellant filed a timely notice of appeal [C. T. 36].

The jurisdiction of the District Court was predicated upon

1/ "C. T." refers to Clerk's Transcript on Appeal.

Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal under the provision of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession

shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF THE CASE

Appellant was indicted on June 16, 1965, charged with both concealment and sale of heroin on each of two separate occasions [C. T. 2-5].

He was arraigned on July 6, 1965, and entered a guilty plea to all counts on August 23, 1965 [C. T. 6-7].

Trial by jury commenced September 21, 1965, before the Honorable Peirson M. Hall, United States District Judge [C. T. 28]. Appellant was found guilty on all counts on September 23, 1965 [C. T. 32].

On October 11, 1965, appellant was sentenced to 15 years on each of Counts One and Two to run concurrently, and five years imprisonment on each of Counts Three and Four to run concurrently to each other and consecutively to Counts One and Two [C. T. 33].

Appellant filed a Notice of Appeal on October 11, 1965 [C. T. 36].

IV

STATEMENT OF FACTS

A few days before March 9, 1964, appellant agreed to sell one ounce of heroin to Albert Johnson for $300 [R. T. 64-65]. 2/

On March 9, 1964, Johnson called appellant and told him he was ready. Appellant then said come over to the house [R. T. 67]. This call was monitored by agents of the Federal Bureau of Narcotics [R. T. 66, 113-114].

Johnson and his car were searched and he was given $300 advance funds [R. T. 67].

Narcotics Agents followed Johnson to appellant's home where he met appellant [R. T. 68]. Johnson gave appellant the advance funds and followed him to a taco stand. Appellant went behind the stand, then returned and gave the heroin to Johnson [R. T. 57, 69].

On April 6, 1965, Johnson again called appellant and asked to purchase an ounce of heroin. Appellant told Johnson to meet him in a park. This call was also monitored by Federal Agents [R. T. 74, 131].

Appellant met Johnson at the park, at which time Johnson gave appellant $300 in advance funds and was told that appellant had the heroin stashed [R. T. 75]. Johnson then followed appellant to a parking lot where he was told the heroin was in the phone booth.

2/ R. T. refers to Reporter's Transcript.

Johnson looked in the phone booth but couldn't find it. Appellant then told him it was over the door, and Johnson found it [R. T. 75-77].

While in the parking lot, appellant told Johnson that this was the manner in which he would deal in the future. A buyer would call him and he would have the heroin stashed in some place and tell the buyer where to pick it up [R. T. 78]. Appellant also told Johnson he was going to Mexico to get more heroin [R. T. 78].

Prior to going to the park to meet appellant, Johnson was provided with a transmitter [R. T. 76]. As a result, the conversation at the park and the parking lot were overheard by the Federal Agents who were working surveillance [R. T. 133-137].

Appellant's defense was that his meetings with Johnson were to straighten out a misunderstanding involving appellant and Johnson's wife [R. T. 168-169, 173]. He further denied ever selling narcotics to Johnson, receiving money from him, or using the term "piece of stuff" in a conversation with him [R. T. 178-179].

V

QUESTIONS PRESENTED

1. Is the evidence sufficient to establish possession of the narcotics by defendant?

2. Did the Court err in refusing to instruct on entrapment?

3. Did the court commit plain error in failing to strike

certain testimony or declare a mistrial?

VI

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO ESTABLISH DEFENDANT'S POSSESSION OF THE NARCOTICS.

That there was direct evidence of defendant's possession of the heroin is conceded by appellant [A. B. 8]. 3/ The evidence consisted of testimony by a government informant that the heroin was delivered to him by the appellant [R. T. 57, 69, 75, 77]. This testimony was partially corroborated by the government agents who monitored the phone calls that resulted in the agreement and observed the meetings of the informant and appellant [R. T. 113-14, 118-19, 131-32, 136-37]. From these facts, appellant's contention that there is no evidence of possession is patently without merit.

The only question remaining, therefore, is whether the testimony of an informant is sufficient to establish the fact of possession. The answer is clear:

An informant's testimony is competent and his credibility is exclusively for the jury.

United States v. Hoffa, 385 U.S. 293 (1966);

3/ A. B. refers to Appellant's Brief.

United States v. Cooper, 321 F. 2d 456, 458 (6th Cir. 1963);

Proffit v. United States, 316 F. 2d 705 (9th Cir. 1963);

Stopelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. denied, 340 U. S. 864 (1950).

The uncorroborated testimony of a competent witness, whether he is an informant or accomplice, is sufficient to prove a fact. Audett v. United States, 265 F. 2d 837 (9th Cir. 1959).

When, as here, the jury choose to believe a witness, this Court will not substitute its judgment for that of the jury. Diaz-Rosendo v. United States, 357 F. 2d 124 (9th Cir. 1966).

In considering the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the appellee, together with all reasonable inferences which may be drawn from that evidence. Noto v. United States, 367 U. S. 290 (1961); Glasser v. United States, 315 U. S. 60 (1942). If the court finds substantial evidence, it must presume the findings of fact to be correct and sustain the judgment. Noto v. United States, supra; Ingram v. United States, 360 U. S. 672, 678 (1959).

B. THE REFUSAL BY THE TRIAL COURT TO INSTRUCT ON ENTRAPMENT WAS PROPER.

That a defendant who denies committing the acts charged is

not entitled to an instruction on the defense of entrapment is settled in this circuit.

Garibaz-Garcia v. United States, 362 F. 2d 509 (9th Cir. 1966);

Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965);

Dunbar v. United States, 342 F. 2d 979 (9th Cir. 1965).

Since appellant at the trial denied having committed the acts which constituted the crime [R. T. 171, 178], the trial court did not err in refusing to instruct on entrapment.

C. NO PREJUDICIAL ERROR OCCURRED IN THE PROCEEDINGS BELOW.

Although the Court and the Assistant United States Attorney gave him every opportunity to do so, appellant refused to object or move to strike any of his testimony on cross-examination of which he now complains [R. T. 171, 175-6]. Neither did appellant request, orally or in writing, a limiting instruction on the evidence elicited. His reason is apparent: he agreed that the evidence would be proper on the issue of credibility [R. T. 199]. Appellant has, therefore, waived any objection to the introduction of the evidence, Fed. R. Crim. P. 51, and to the court's failure to give a limiting instruction. Fed. R. Crim. P. 30; Wright v. United States, 192 F. 2d 595, 596

(9th Cir. 1951).

Assuming arguendo that this contention is properly before the court, the evidence is admissible under the circumstances. Clearly, a defendant may be asked about prior felony convictions for impeachment purposes. Admission of appellant's conviction for possession of marihuana was therefore proper on the issue of his credibility. United States v. Owens, 263 F. 2d 720 (2nd Cir. 1959). Appellant, it should be noted, was not asked whether he had been convicted of possession of marihuana, but whether he had been convicted of possession of narcotics; appellant answered that he had been convicted of possessing marihuana [R. T. 196]. No further questions were asked on this issue, and appellant took no steps to strike the answer or to limit it.

Additionally, evidence of prior possession of narcotics is admissible on the issue of knowledge or intent in a trial for possession of heroin; the questions as to prior possession of narcotics were therefore proper. Enriquez v. United States, 314 F. 2d 703 (9th Cir. 1963); Teasley v. United States, 292 F. 2d 460, 466-7 (9th Cir. 1961). For the same reason, cross-examination of appellant as to whether he had knowledge of narcotics and had dealt with narcotics was proper under the recognized exception that in a narcotics case, evidence of prior similar acts to show "knowledge" is admissible. Klepper v. United States, 331 F. 2d 694 (9th Cir. 1964); Enriquez v. United States, supra. Even without a cautionary instruction, its admission is not erroneous. Wright v. United States, supra; cf. Teasley v. United States, supra.

Moreover, under the authority cited above, absent an objection, a motion to strike, or a request for a limiting instruction, appellant cannot contend that introduction of this evidence was prejudicial error.

It is noteworthy that appellant cites not a single case in support of his contention that the trial court committed plain error in failing to strike appellant's testimony, give a limiting instruction, or declare a mistrial, even though the record is conspicuously devoid of action by the appellant to prevent error. A defendant may not sit idly by in the face of error and later take advantage of a situation he has helped to create. United States v. Grosso, 358 F. 2d 154 (4th Cir. 1966). In this case, appellant clearly invited error, if there was any, by his refusal to object or move to strike [R. T. 196, 198-9], failure to request a limiting instruction, and failure to move for a mistrial.

Finally, in view of the foregoing discussion, any alleged error was by no means "plain", since all of the testimony was probably admissible over a proper objection. Appellant's failure to act to exclude or limit it will not serve to make the error "plain", or to show prejudice resulting from its admission in view of the strong case against him. See United States v. Comi, 336 F. 2d 856, 861 (4th Cir. 1964).

VII

CONCLUSION

For the foregoing reasons, it is submitted that appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN